Petition

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NO. 81-399

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

THE STANDARD REGISTER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a union's intent is determinative of whether its threats to employees on the eve of a representation election tainted the laboratory conditions so that the election must be set aside?

2. Whether the fact that a union's election eve wage misrepresentations of 78% and 88% may be partially true with respect to one of the 152 voters is determinative of whether the misrepresentations warrant the setting aside of the election?

3. Whether the fact that the union which ultimately won a runoff election was not responsible for election eve threats and misrepresentations which tainted the laboratory conditions for the initial election is determinative of whether the election should be set aside?

4. Whether the court improperly substituted its own rationale for that of the NLRB and upheld the NLRB's decision on a basis different from that articulated by the agency?

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Contents iii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved . . 1

Statement of the Case

- The Facts 2
- The Board's Decision 6
- The Decision of the Court of Appeals 11
- The Stay of the Sixth Circuit's Mandate . . . 12

Why the Petition Should Be Granted

I. The Decision Creates A Conflict Among the Circuits Regarding the Standard For Determining Whether Threats To The Electorate Require The Setting Aside Of An Election 14

II. The Decision On The Misrepresentation Issue Conflicts With The Board's Hollywood Ceramics Doctrine, Decisions Of The Sixth Circuit And Other Circuit Courts 19

PAGE

A. The Correct Standard for Determining Whether an Election Must be Set Aside Because of Misrepresentations to the Voters: Hollywood Ceramics and Its Progeny 19

B. The Consistent Application of Hollywood Ceramics in Wage Misrepresentation Cases Decided by the Sixth Circuit and Other Circuit Courts of Appeal 21

C. The New Test 23

III. The "Essentially Correct" Test Conflicts With The Decisions Of The Other Circuits And Contravenes Fundamental Labor Policies 24

IV. The Majority's "Clean Hands" Standard Conflicts With Decisions Of Other Circuits And Misconstrues The Function Of The Board In The Election Process 31

V. The Majority Improperly Substituted Its Own Rationale As A Basis For Upholding The Board 36

Conclusion 38

Appendix A

Decision and Order of the Court of Appeals 1a

PAGE

Decisions and Orders of the National Labor Relations Board

Decision and Direction of Runoff Election, 236 NLRB 699, 1978 CCH NLRB ¶19, 336, 98 LRRM 1308 (1978) 17a

Supplemental Decision and Certification of Representative, 239 NLRB 1066, 1978-79 CCH NLRB ¶15, 385, 100 LRRM 1089, corrected at 101 LRRM 1045 (1978) 28a

Decision and Order, 243 NLRB No. 32, 1979-80 CCH NLRB ¶15, 986, 101 LRRM 1398 (1979) 33a

Supplemental Decision and Order, 246 NLRB No. 54, 1979-80 CCH NLRB ¶19, 467, 102 LRRM 1489 (1979) . . . 67a

Sixth Circuit Order Denying Petitioner's Request for Rehearing and Suggestion for Rehearing En Banc . . 73a

Sixth Circuit Order Granting Petitioner's Request for Stay of Mandate Pending Petition for Certiorari 75a

Appendix B

National Labor Relations Act, 29 U.S.C. § 157, 158(a)(1), 158(a)(5), 158(b)(1)(A) . . . 1b

TABLE OF AUTHORITIES

PAGE

SUPREME COURT CASES:

Burlington Truck Lines, Inc. v. U. S., 371 U.S. 156 (1962) . . 38

International Association of Machinists, Tool and Die Makers Lodge No. 35 v. NLRB, 311 U.S. 72 (1940) 18,38

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) . . . 19

NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938) 18,19

NLRB v. Pipefitters Local 683, 479 U.S. 507 (1977) 38

NLRB V. Wyman-Gordon Co., 394 U.S. 759 (1969) 38

S.E.C. v. Chenery Corp., 332 U.S. 194 (1947) 37

S.E.C. v. Chenery Corp., 318 U.S. 80 (1943) 38

CIRCUIT COURT CASES:

Allis-Chalmers Mfg. Co. v. NLRB, 261 F.2d 613 (7th Cir. 1958) . 28

Celanese Corp. of America v. NLRB, 279 F.2d 204 (7th Cir. 1960) 28,30

PAGE

Cross Baking Co. v. NLRB, 453 F.2d 1346 (1st Cir. 1971) 35

Cross Co. v. NLRB, 286 F.2d 799 (6th Cir.), rehearing denied, 288 F.2d 188 (6th Cir. 1961) . 27

Diamond Electronics Division of Arvin Industries, Inc. v. NLRB, 570 F.2d 156 (6th Cir. 1975) 19,22, 25,26, 31

Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968) . . . 22

Graphic Arts Finishing Co. v. NLRB, 380 F.2d 893 (4th Cir. 1967) . 21

Home Town Foods, Inc. v. NLRB, 416 F.2d 392 (5th Cir. 1969) . . . 34

J. I. Case Co. v. NLRB, 555 F.2d 202 (8th Cir. 1977) 29

Methodist Home v. NLRB, 596 F.2d 1173 (4th Cir. 1973) 15,32,35

NLRB v. Carroll Contracting & Ready-Mix, Inc., 636 F.2d 111 (5th Cir. 1981) 35

NLRB v. Gilmore Industries, Inc., 341 F.2d 240 (6th Cir. 1965) . 29

NLRB v. Gulf States Canners, Inc., 585 F.2d 757 (5th Cir. 1978) . 16

NLRB v. Houston Chronicle Publishing Co., 300 F.2d 273 (5th Cir. 1962) 29

PAGE

NLRB v. Millard Metal Service Center, 472 F.2d 647 (1st Cir. 1973) 21,30

NLRB v. Mr. Fine, Inc., 516 F.2d 60 (5th Cir. 1975) 28,29

NLRB v. Southern Paper Box Co., 473 F.2d 208 (8th Cir. 1973) . 35

NLRB v. Urban Telephone Corp., 499 F.2d 239 (7th Cir. 1974) . . . 35

NLRB v. Van Gorp Corp., 615 F.2d 759 (8th Cir. 1980) 21

Plastic Masters, Inc. v. NLRB, 512 F.2d 449 (6th Cir. 1975) . 16

United States Gypsum Co. v. United Steelworkers of America, 384 F.2d 38 (5th Cir. 1967), cert. denied, 389 U.S. 1042 (1968) 4

Zeiglers Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000 (3d Cir. 1981) 33

NLRB CASES:

Al Long, Inc., 173 NLRB 447 (1968) 34

Diamond State Poultry Co., 107 NLRB 3 (1953) 33

General Knit of California, Inc., 239 NLRB 619 (1978) 11,20

PAGE

Hollywood Ceramics Co., 140 NLRB 221 (1962) 11,19, 20,21, 22,23, 24,27, 31

Ore-Ida Foods, Inc., 160 NLRB 1396 (1966) 34

Orleans Manufacturing Co., 120 NLRB 630 (1958) 33

P. D. Gwaltney, Jr. and Co., 74 NLRB 371, 380 (1947) 33

Shopping Kart Food Market, Inc., 228 NLRB 1311 (1977) . . . 7,11,20

OPINIONS BELOW

The opinion of the court of appeals is reported at 614 F.2d 412 (1981) (Appendix A at 1a). The decisions of the National Labor Relations Board (Appendix A at 17a, 28a, 33a and 67a) are reported at 236 NLRB 699; 239 NLRB 1066; 243 NLRB No. 32; and 246 NLRB No. 54.

JURISDICTION

The judgment of the court of appeals was rendered on May 14, 1981 (Appendix A at 1a) and rehearing was denied on June 29, 1981 (Appendix A at 73a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, Sections 7, 8(a)(1), 8(a)(5) and 8(b)(1)(A), are set forth in Appendix B.

STATEMENT OF THE CASE

A. The Facts

The National Labor Relations Board ("NLRB") conducted a representation election among the employees of Petitioner, The Standard Register Company ("the Company"), on March 11, 1977. Three (3) choices were on the ballot: The Dayton Pressmen's Local No. 54 ("the Pressmen"), which had filed the petition for election; The Graphic Arts International Union ("the GAIU"); the incumbent union which had represented the employees for almost twenty (20) years; and "no union." Fifty-seven (57) employees voted for the GAIU, fifty-two (52) for the Pressmen, and forty (40) for neither union.

The Company filed Objections to Conduct Affecting the Results of Election because the imcumbent union, the GAIU, had made impermissible threats and misrepresentations to the employees in a

handbill distributed within twenty-four (24) hours of the election. The timing of the GAIU's action precluded the Company from responding, and the voters were intimidated, misled and improperly influenced.

The Company objected to the following threat in the handbill:

> . . . As the Company stated in their presentation to the employees, the GAIU has a case pending in Court regarding the "lost" $ .45 wage increase. It would be to the Company's advantage if the GAIU was defeated in the election and would ultimately decide not to spend the remaining members' dues in an effort to collect the lost wage increase for its former members. This would relieve the Company of an approximately $4,000 pending liability per each affected member . . .

* * *

The Company objected to the GAIU's threat to abandon its statutory duty of fair representation if it failed to win

the election,[1] and its blatant misrepresentation of the amount of recovery the employees would receive if the GAIU were re-elected and prevailed in the pending arbitration. The maximum amount would be $1,755 per member, less than one-half of that claimed by the GAIU.

The Company's second objection arose from the following wage misrepresentations in the handbill:

> It was reported that [a Pressmen] International Representative revealed at their beer party that the Standard

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[1] The GAIU had a duty of enforcing substantive rights under its pre-existing collective bargaining agreement with the Company which would not have been extinguished by its defeat in the representation election, and the GAIU would have continued to be responsible for full and fair representation of employees in grievances which arose during the life of its contract with the Company regardless of whether it won the election. United States Gypsum Co. v. United Steelworkers of America, 384 F.2d 38 (5th Cir. 1967), cert. denied, 389 U.S. 1042 (1968).

> Register Company employees in York, Pa. are receiving approximately $1.00 per hour less than the Dayton employees and in Fayetteville the difference is approximately $1.50 per hour less. That figures out to be $37.50 less per week or $1,950 less per year in York, Pa., and $56.25 less per week or $2,925 less per year in Fayetteville, Arkansas.

The GAIU grossly misrepresented the amount by which its members' wages exceeded those of employees at the Company's other plants. Not one Dayton employee made $1.00 more than his York counterpart, and only one Dayton employee made as much as $1.50 more than his Fayetteville counterpart. The average differential was only $ .56 per hour between Dayton and York, and $ .79 per hour between Dayton and Fayetteville, meaning that the GAIU overstated the differentials by averages of 78.6% and 88.2%, respectively.

B. The Board's Decision

Without holding an evidentiary hearing, the Regional Director recommended that the Company's objections be overruled. In a 2 to 1 decision, the Board overruled the objections on June 2, 1978. 236 NLRB 699 (1978).

With respect to the GAIU's election eve threat to abandon the wage arbitration case if the employees failed to vote for the GAIU, the majority asserted that the statement was not a threat because the GAIU had not intended it to be a threat. Instead, speculated the Board, the statement was intended as a reply to "unflattering implications" contained in a letter the Company had distributed earlier. The Board cited no facts to support its extrapolation of the GAIU's intent, nor did it cite any cases to support its rationale that only intentional threats can interfere with an

election and require its invalidation. Member Jenkins dissented, recognizing that the GAIU's statement "clearly constituted an implied threat . . . and thus interfered with the employees' right to express their wishes in the election free of coercion." 236 NLRB at 700.

The Board summarily disposed of the misrepresentation issue by citing Shopping Kart Food Market, Inc., 228 NLRB 1311 (1977),[2/] and upholding the Regional Director's conclusion that the misrepresentations did not warrant setting aside the election.

Because no party had received a majority of the votes, the Board ordered a runoff election between the GAIU and

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2/ In Shopping Kart, the Board announced that it would no longer set aside representation elections on the basis of misleading campaign propoganda.

the Pressmen. The Company's Request for Reconsideration was denied by a 2 to 1 vote.

In the runoff election on July 14, 1978, the employees were denied the right to choose the "no union" alternative. That choice was excluded from the ballot and the Board agent instructed employees as they entered the polling place that write-in votes for "no union" would not be counted. The Pressmen, which by the time of the runoff had been able to respond to the GAIU's false wage comparisons, won the election with seventy-three (73) votes, while the GAIU lost the support of twenty (20) voters and received only thirty-seven (37) votes.[3/]

[3/] Ten (10) ballots, an insufficient number to change the outcome of tne election, were challenged.

The Company filed objections to the runoff election, based on the Board's refusal to set aside the initial election and to allow the employees to vote "no union" in the second election. Again, without holding a hearing, the Regional Director recommended that the objections be overruled. In another 2 to 1 decision on December 27, 1979, the Board overruled the objections and directed that the Pressmen be certified as the employees' collective bargaining representative. 239 NLRB 1066 (1979). Reiterating his view that the GAIU's handbill had impermissibly threatened the voters in the first election, Dissenting Member Jenkins asserted that the second election should have offered all three choices on the ballot.

In order to obtain judicial review of the Board's decision regarding the

validity of the elections, the Company declined to bargain with the Pressmen. The Pressmen filed an unfair labor practice charge on January 23, 1979, contending that the Company's refusal to bargain violated Sections 8(a)(5) and 8(a)(1) of the Act. While the Company vigorously denied that its refusal to bargain constituted an unfair labor practice, the Board granted summary judgment against the Company in a 2 to 1 decision. 243 NLRB No. 32 (1979). Member Jenkins once again dissented on the grounds that the runoff election had been improperly directed and the Pressmen's certification was invalid.

The Company immediately sought review of the Board order from the United States Court of Appeals for the Sixth Circuit. Meanwhile, the Board decided, sua sponte, to reconsider its decision

on the wage misrepresentation issue because its standard for assessing misrepresentations had changed. In General Knit of California, Inc., 239 NLRB 619 (1978), the Board overruled Shopping Kart and reinstituted the criteria which had been set forth in Hollywood Ceramics Company, Inc., 140 NLRB 221 (1962).

Without holding a hearing, three of the five Board members decided that the GAIU's wage misrepresentations constituted "normal election propaganda which was not substantially or materially misleading under the Hollywood Ceramics test." 246 NLRB No. 54, slip op. at 3 (1979).

C. The Decision of the Court of Appeals

Over a strong dissent, the Sixth Circuit Court of Appeals denied the Company's petition and upheld the Board's order. Despite the fact that the GAIU's threat to the voters was a basis of the

Board's decision and was briefed and argued before the court, the majority failed to address the issue and adopted sub silentio the Board's ruling that the GAIU's intent was determinative of whether its statement was an impermissible threat. With respect to the election eve wage misrepresentations, the majority enunciated a new standard which focused on the fact that (1) the GAIU's claim was partially true with respect to one of the 152 voters; and (2) the Pressmen, which won the runoff, had not been responsible for the destruction of the laboratory conditions in the first election.

D. The Stay of the Sixth Circuit's Mandate

The Company filed a Request for Rehearing and Suggestion for Rehearing En Banc. When the court denied the Request on June 29, 1981 (Appendix A at 73a), the

Company requested a stay of mandate pending this Petition for Certiorari. The Company noted that (1) the Sixth Circuit's ruling conflicted with its own precedent, with the decisions of other circuit courts of appeals, and with the decisions of the NLRB on issues of major significance under the federal labor laws; (2) the case had sharply divided the NLRB and the Sixth Circuit, each of which had issued a decision over the protests of a vigorous dissent; and (3) because the validity of the Pressmen's certification was in serious doubt, any bargaining the Company might conduct with it could constitute an unfair labor practice.

The Sixth Circuit granted the Company's Request and stayed its mandate pending this Petition for Certiorari (Appendix A at 75a).

WHY THE PETITION SHOULD BE GRANTED

I.

The Decision Creates A Conflict Among The Circuits Regarding The Standard For Determining Whether Threats To The Electorate Require The Setting Aside Of An Election

The Sixth Circuit majority ignored the Company's appeal insofar as it was based upon the Board's improper consideration of the GAIU's intent in deciding that its threat to the voters did not warrant setting aside the election. By failing to address the issue, the majority adopted the Board's ruling sub silentio.[4/]

[4/] The majority's refusal to address the issue in its opinion is unexplainable, particularly in light of the fact that the recurring dissent of Member Jenkins throughout the proceedings below was based on his view that the threat invalidated the election. Dissenting Judge Kennedy pointed out that the majority failed to discuss the effect of the union's threat on the election.

The intent standard conflicts with Board precedent, with decisions of the Fourth and Fifth Circuits, as well as with a prior decision by the Sixth Circuit.

A party's intent has never been considered determinative of whether a threat to the voters requires that an election be set aside. The potential impact of the threat on the voters is the pivotal consideration.

As the Fourth Circuit explained in Methodist Home v. NLRB, 596 F.2d 1173, 1181 (4th Cir. 1973):

> [T]he critical point is how the incident was viewed by . . . employees . . . . [T]he issue is whether the incident had a chilling effect on the election and that turns on the reaction to the incident of the employees who were entitled to vote at the impending election (citation omitted).

The intent of the threatening party is immaterial to the question of whether

the threat was likely to have influenced the voters, as recognized by the Fifth Circuit in NLRB v. Gulf States Canners, Inc., 585 F.2d 757, 759 (5th Cir. 1978):

> [T]he effects of an act intended to influence an election may be so minimal that the outcome remains unaffected. Conversely an unintentional act may have such a deleterious effect on the conduct of an election that the result does not reflect the voters' free will. In determining whether an election should be invalidated, the focus should be on the effects of a particular act on the electorate rather than on the actor's intent.

The Sixth Circuit's approval of an intent standard not only conflicts with the decisions of the Fourth and Fifth Circuits, it is directly contrary to a 1975 decision by a different panel of the Sixth Circuit. In Plastic Masters, Inc. v. NLRB, 512 F.2d 449, 450 (6th Cir. 1975), the court unequivocally rejected the notion that intent was a controlling factor:

> [I]n our opinion the intent or absence of intent on the part of the Union to influence the employees' votes . . . is not a controlling factor. Whether the conduct of the Union was intended to influence the vote, these actions 'undoubtedly had a tendency to influence the election results.' Collins & Aikman Corp. v. NLRB, 383 F.2d 722, 729 (4th Cir. 1967).

Significantly, the lone member of the panel in this case who considered the issue found that the threat required the setting aside of the election. Judge Kennedy agreed with NLRB Member Jenkins that the GAIU's statemen regarding abandonment of the pending arbitration case constituted "an impermissible threat . . . to abandon the bargaining re resentative's statutory duty to represent the unit membership after the election." 614 F.2d at 415. Rejecting the Board's finding that the statement was not a prognostication, Judge Kennedy admonished that:

> We must read the language as it would be likely to be understood by the ordinary reader. It is what was said that was important, not what was intended to be said. Certainly the statement here was "reasonably susceptible of coercive implications."

Id. (citing G. H. Hess, Inc., 82 NLRB 463 (1949)).

The majority's affirmance of the Board's decision means that irrespective of the coercive effect of threats on the voters, an election held under the influence of those threats will not be set aside if the Board speculates that the threatening party did not intend its statements to be coercive. This standard contravenes the paramount objective of federal labor laws, which is "to secure the employees freedom of choice in the selection of their representatives." International Association of Machinists, Tool and Die Makers Lodge No. 35 v. NLRB, 311 U.S. 72 (1940); NLRB v. Pennsylvania

Greyhound Lines, 303 U.S. 261 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

II.

The Decision On The Misrepresentation Issue Conflicts With The Board's Hollywood Ceramics Doctrine, Decisions Of The Sixth Circuit And Other Circuit Courts

The majority's decision that the GAIU's wage misrepresentations did not require setting aside the election conflicts with the Board's Hollywood Ceramics doctrine, with the Sixth Circuit's own decision in Diamond Electronics Division of Arvin Industries v. NLRB, 570 F.2d 156 (6th Cir. 1975), and with decisions of the other circuit courts.

A. The Correct Standard For Determining Whether An Election Must Be Set Aside Because Of Misrepresentations To Voters: Hollywood Ceramics And Its Progeny

In Hollywood Ceramics Co., Inc., 140 NLRB 221 (1962), the Board set forth

what has now been the standard for evaluating pre-election misrepresentations for almost twenty (20) years,[4] announcing that:

> [A]n election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

Id. at 224 (emphasis supplied) (footnote omitted).

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[4] In April 1977, the Board overruled Hollywood Ceramics in Shopping Kart Food Market, Inc., 228 NLRB 1311 (1977) and announced that it would no longer set aside elections on the basis of misleading campaign statements. By December 1978, the Board had reconsidered, and in General Knit of California, Inc., 239 NLRB 619 (1978), it reinstituted the Hollywood Ceramics standard.

B. The Consistent Application Of Hollywood Ceramics In Wage Misrepresentation Cases

Applying the Hollywood Ceramics criteria, the courts have invariably held that wage misrepresentations of less than the $.44 and $.70 per hour, or 78% and 88% presented in this case constituted "substantial departure[s] from the truth" which, if made at a time when effective reply was impossible, required the holding of a new election. NLRB v. Millard Metal Service Center, 472 F.2d 647, 650 (1st Cir. 1973) ("it cannot be gainsaid that a wage distortion of this magnitude [$ .42 per hour] constitutes a substantial misrepresentation likely to have a significant impact on an election"); Graphic Arts Finishing Co. v. NLRB, 380 F.2d 893 (4th Cir. 1967) (it was "beyond question" that wage overstatement of $ .33 per hour or 10% was material and invalidated election); NLRB v. Van Gorp Corp., 615 F.2d

759 (8th Cir. 1980) (claim of $ .12 per quarter cost of living raise rather than $ .12 per year was substantial misrepresentation); Gallenkamp Stores Co. v. NLRB, 402 F.2d 525 (9th Cir. 1968) (election invalid where union misrepresented wages by $ .30 to $ .55 per hour).

The Sixth Circuit itself, applying the Hollywood Ceramics standard, has held that a 40% overstatement of wages was materially misleading and invalidated an election. In Diamond, supra, the union claimed in an election eve letter that it had negotiated a $ .70 per hour wage increase with a nearby employer. In fact, the increase was only $ .50 per hour. Applying Hollywood Ceramics, the court found that "[t]his was a material misrepresentation with respect to wage rates, a matter of great concern to employees." 570 F.2d at 157.

No court, including the Sixth Circuit, has held that wage misrepresentations of the magnitude found here were permissible under Hollywood Ceramics. In a radical departure from Hollywood Ceramics and all other reported Board and court precedent, the majority devised a new test for determining whether misrepresentations have tainted the laboratory conditions necessary for a free and fair election so that a new election must be held.

C. The New Test

Under the majority's new test, even election eve misrepresentations will not be grounds for setting aside an election as long as (a) the misleading statements can be characterized as "essentially correct"; and (b) the party which ultimately won the election was not responsible for the misrepresentations and can

claim "clean hands." The new standard falsely and irrebuttably presumes that voters may be misled only by totally false statements made by the party which prevails in the election.

III.

The "Essentially Correct" Test Conflicts With The Decisions Of Other Circuits And Contravenes Fundamental Labor Policies

Abandoning the Hollywood Ceramics "substantial departure from the truth" standard, the majority asserted that the GAIU's handbill conveyed the "essentially correct" message that it had won higher wages for its members than employees at the Company's other plants received. The majority treated as inconsequential the fact that the GAIU grossly misrepresented the wage differentials, overstating the amounts by an average of 78% and 88%. Instead, the majority focused on the fact that one of the 152 eligible voters

actually earned the differential claimed in the GAIU's handbill.[6/] The court distinguished Diamond, supra, where it had held that a wage misrepresentation of 40% was materially misleading on the grounds that in Diamond, "[t]here was no truth to the union's contention . . . that it had won a 40% increase in a single negotiation."

The court's post hoc rationale does not square with what the opinion in Diamond says. The union in Diamond did not falsely claim to have won a 40% wage increase; it overstated by 40% the amount of the increase it had obtained. Further, nowhere in the Diamond opinion

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6/ Even with respect to this employee, the GAIU's claims were only half true. The Fayetteville differential was accurate, but the GAIU overstated by 40% the amount by which the employee's earnings exceeded those of his York counterpart.

is it stated that the union claimed to have won the increase in a single negotiating session.7/

Even assuming, arguendo, that the majority accurately recounted the facts of the Diamond case and that the union's claims therein had been completely false, the majority's reliance on that fact as a determinative factor in evaluating pre-election misrepresentations contravenes fundamental principles of labor law and conflicts with decisions of the other circuits.

Under the majority's rationale, if there is any truth to a statement, it

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7/ Presumably, according to the majority's current rationale, if the union in Diamond had correctly stated the number of negotiating sessions it held before obtaining an increase, the fact that it overstated the amount by 40% would have been immaterial.

will not be considered a material misrepresentation even if it involves "a substantial departure from the truth, at a time which prevents . . . an effective reply, so that the misrepresentation . . . may reasonably be expected to have a significant impact on the election." Hollywood Ceramics, 140 NLRB at 224. Instead of condemning statements which contain any substantial departure from the truth, the Sixth Circuit has turned the standard completely around and will uphold representations which contain any truth whatsoever.

The Sixth Circuit rejected this approach to campaign propoganda in Cross Co. v. NLRB, 286 F.2d 799 (6th Cir.), rehearing denied, 288 F.2d 188 (6th Cir. 1961), and other courts have recognized that a statement which is partially true may be just as damaging to the integrity of an election as a total falsehood.

The pivotal determination, the potential impact on the electorate, cannot be made simply by considering whether the statement bears any semblance of truth.

As noted by the Fifth Circuit in NLRB v. Mr. Fine, Inc., 516 F.2d 60, 61 n. 1 (5th Cir. 1975):

> A misrepresentation need not be false to establish unfairness in an election. Implications, omissions or half-truths from which false inferences may be drawn, if such inferences have an impact on election results, have been accorded the same status as an outright untruth (citations omitted.)

See also Celanese Corp. of America v. NLRB, 279 F.2d 204 (7th Cir. 1960)("half-truths" rendered election invalid); Allis-Chalmers Mfg. Co. v. NLRB, 261 F.2d 613 at 616 (7th Cir. 1958)(". . . there cannot be 'virtually' the truth" . . . in campaign propaganda).

Particularly with respect to wages, "the stuff of life for Unions and

members," NLRB v. Houston Chronicle Publishing Company, 300 F.2d 273, 280 (5th Cir. 1962), statements which fall short of total falsity may be destructive of the "atmosphere conducive to the sober and informed exercise of the franchise." NLRB v. Gilmore Industries, Inc., 341 F.2d 240, 241 (6th Cir. 1965). As the Fifth Circuit noted in Mr. Fine: "Claims involving wages and benefits based on unstated hypotheses constitute a prima facie misrepresentation." 516 F.2d at 63.

In J. I. Case Co. v. NLRB, 555 F.2d 202 (8th Cir. 1977), a union's wage claims were accurate with respect to 8 of 51 employees. Rejecting the Board's conclusion that the claims were not substantial misrepresentations, the Eighth Circuit stated:

> That 8 employees of 51 in the category were earning at [the level claimed by the union] is

> not even closely related to the expectation which the misrepresentation was almost certain to engender. We are concerned with the effect of such a misrepresentation upon the ability of the employee to make a free and informed choice of his representative.

Id. at 205 (emphasis in original).

The First Circuit set aside an election in NLRB v. Millard Metal Service Center, supra, on the basis of a $ .42 per hour claimed wage differential even though the figure was accurate with respect to 10 of the 27 voters. See also Celanese Corp. v. NLRB, supra (claim that fringe benefits were won through collective bargaining, when in fact only some of the benefits were so obtained, invalidated the election).

Applying its new standard, the Sixth Circuit majority would have upheld the election results in all of the above wage misrepresentation cases, because in each one the message conveyed was "essentially

correct." Conversely, the GAIU's 78% and 88% overstatements regarding of the wages of 151 of the 152 voters unquestionably constituted a "substantial departure from the truth" and would have resulted in a new election had the Sixth Circuit majority adhered to the Hollywood Ceramics standard used by the other circuit courts of appeals.

IV.

The Majority's "Clean Hands" Standard Conflicts With Decisions Of Other Circuits And Misconstrues The Function Of The Board In The Electi.. rrocess

The second element of the majority's new test for evaluating pre-election misrepresentations was also a product of its attempt to distinguish the Diamond decision. The majority pointed out that the union which made the misrepresentations in Diamond won the election, whereas in this case

> the GAIU did not win the election and the Pressmen, the current collective bargaining agent, did nothing to adversely affect the 'laboratory conditions' of the election process.

614 F.2d at 415.

Under the majority's new theory, if the party which wins an election has done nothing itself to affect the laboratory conditions, its certification will be valid irrespective of whether the voting conditions were "conducive to the sort of free and untrammeled choice of representatives contemplated by the Act." Methodist Home v. NLRB, 596 F.2d 1173, 1183 (4th Cir. 1979).

Neither the Board nor any other circuit court has ever held that the validity of an election hinges upon whether the victorious party had "clean hands."[8/] The Board sets aside an

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8/ While the Board and courts have required a greater showing of interference when third party misconduct is

election whenever it was not held in "an atmosphere conducive to the sort of free, uninhibited choice of representatives which the Act contemplates," irrespective of whether the party which won the election was at fault. P. D. Gwaltney, Jr. and Co., 74 NLRB 371, 380 (1947). See also Diamond State Poultry Co., 107 NLRB

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alleged, they have done so not because the party which won the election had "clean hands," but because third party conduct generally is believed to have less effect upon voters than the conduct of the parties to the election. Orleans Mfg. Co., 120 NLRB 630 (1958). See also Zeigler's Refuse Collectors, Inc. v. NLRB, 639 F.2d 1000 (3d Cir. 1981), and cases cited therein. In this case, the "third party" was not a third party at all. At the time it made the misrepresentations, the GAIU was a party to the election and had been the representative of the voters for many years. That its unrefuted, last minute statements were given great weight by many of the voters is shown by the fact that it lost 20 votes after the "no union" choice was eliminated from the ballot and the Pressmen, its adversary in the runoff, had been able to respond to the misrepresentations.

NLRB 36 (1953) ("It is not material that the fear and disorder . . . cannot be attributed either to the employer or to the unions. The important fact is that such conditions existed and that a free election was thereby rendered impossible"); Ore-Ida Foods, Inc., 160 NLRB 1396 (1966) (two elections set aside because of union's misrepresentations even though that union was not on the ballot in one election); Al Long, Inc., 173 NLRB 447 (1968).

Other circuit courts have agreed that the right of employees to make a free choice regarding representation must be protected from interference by the employer, the union, Board agents or any other party. Home Town Foods, Inc. v. NLRB, 416 F.2d 392, 396 (5th Cir. 1969). Misconduct which has tainted the laboratory conditions, no matter what its source, requires the holding of a new

election. NLRB v. Carroll Contracting Co. & Ready-Mix, Inc., 636 F.2d 111 (5th Cir. 1981); Methodist Home v. NLRB, 596 F.2d 1173 (4th Cir. 1979); NLRB v. Urban Telephone Corp., 499 F.2d 239 (7th Cir. 1974); NLRB v. Southern Paper Box Co., 473 F.2d 208 (8th Cir. 1973); Cross Baking Co. v. NLRB, 453 F.2d 1346 (1st Cir. 1971).

By focusing on the guilt or innocence of the prevailing union rather than the existence or non-existence of the requisite "laboratory conditions" in which the employees could freely exercise their rights, the majority misconstrued the function of the Board in supervising elections. An election is not invalidated in order to punish a party for making misrepresentations or threats. The Board's sole purpose is to insure that the election outcome reflects the free and informed choice of the voters.

If the voters were likely to have been misled or coerced, then the election should be set aside. Conversely, if the circumstances indicate that the voters were not likely to have been affected, the election outcome should stand, even if the culpable party won the election. The touchstone in all cases is the likely impact on the electorate. That consideration was ignored by the majority in this case.

V.

The Majority Improperly Substituted Its Own Rationale As a Basis for Upholding the Board

The majority's reliance upon the fact that the party responsible for the destruction of the laboratory conditions did not ultimately win the runoff election is not only contrary to all reported precedent, it also differs from the rationale of the NLRB in this case.

At no point during the proceedings below was it asserted that which party won the runoff election was material to the determination of whether the first election was invalid.

The majority came up with its own rationale to support the Board's decision regarding the misrepresentations. This it may not do.

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

> [A]n agency's discretionary order [must] be upheld, if at all, on the same basis articulated in the order by the agency itself . . . .

Burlington Truck Lines, Inc. v. U. S., 371 U.S. 156, 169 (1962). See also NLRB v. Pipefitters Local 638, 429 U.S. 507, 522 (1977); S.E.C. v. Chenery Corp., 318 U.S. 80 (1943).

CONCLUSION

The issues presented in this case concern the paramount purpose of the Act, the right of employees to "the fair and free choice of bargaining representatives." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969); International Association of Tool and Die Makers Lodge No. 35 v. NLRB, 311 U.S. 72 (1940).

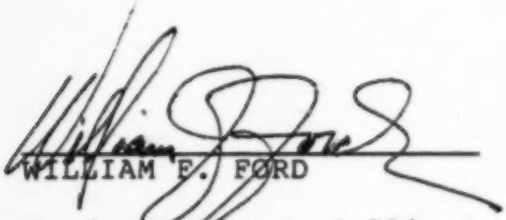
The case has sharply divided the opinions of both the NLRB and the Sixth Circuit. The court's decision squarely conflicts with the decisions of other circuit courts on every issue. This Court should grant certiorari in order

to resolve the conflict among the circuits and give authoritative guidance to the courts and the Board.

Respectfully submitted,

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Appendix

Office-Supreme Court, U.S.
FILED
AUG 28 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-399

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

THE STANDARD REGISTER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE STANDARD REGISTER COMPANY,	)	
Petitioner,	)	
v.	)	O R D E R
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

Before: KEITH, BROWN AND KENNEDY, Circuit Judges

This case is before the court upon a petition by Standard Register Company to review the NLRB's order against the company. The Board's order is reported at 243 NLRB 32, and the supplemental order is reported at 246 NLRB 54. The issue presented by the company is whether the Board properly overruled the company's election objections and, therefore, properly found that the company's refusal to bargain violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The Standard Register Company is engaged in printing business forms at plants in Dayton, Ohio, and other locations in the United States. The company's Dayton employees had traditionally been represented by the Graphic Arts International Union, Local 508, O-K-I, AFL-CIC-CLC (GAIU). Employees at other company plants had been represented by the Dayton Printing and Graphic Communications Union Local 54, AFL-CIO (Pressmen).

On December 27, 1976, the Pressmen filed a petition with the Board seeking to represent the company's employees at the Dayton plant. The GAIU intervened in the election proceeding. On March 2, 1977, the parties executed a Stipulation for Certification upon Consent Election agreement providing for an election on March 11, 1977. Pursuant to the Stipulation, the ballot choices were: GAIU, Pressmen, and neither. The election was conducted

as scheduled, and the results were: 57 votes for the GAIU, 52 votes for the Pressmen, and 40 votes for neither organization. Pursuant to the Board's rules and regulations, a runoff election between the union and GAIU was necessary, since none of the three choices on the ballot received a majority of the votes cast.

On March 17, the company filed timely objections to conduct which allegedly affected the results of the election. The company alleged that the GAIU improperly affected the outcome of the election by engaging in "impermissible promises and inducements, material misrepresentations of fact, and threats at a time when the company was effectively precluded from responding to them." GAIU had sent a handbill out less than 24 hours before the election which misrepresented the salaries of GAIU-represented employees as compared to those of Pressmen, and

which also allegedly included threats of non-representation by the GAIU if it were defeated.

Following an administrative investigation, the Board's regional director issued his Report on Objections on May 17, finding that the objections "raised no substantial or material issue affecting the result of the election," and recommending that the Board overrule the objections and direct a runoff election between the GAIU and the Pressmen. On June 2, the company filed timely exceptions to the director's report.

The runoff election was conducted on July 14. The results were: 73 votes for the Pressmen, 37 votes for the GAIU, and 10 challenged ballots, an insufficient number to affect the results of the election. On August 14, the company again filed timely objections to the runoff election based on the Board's refusal to

which also allegedly included threats of non-representation by the GAIU if it were defeated.

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set aside the initial election. Following an Administrative Investigation, the regional director issued his report on September 19, recommending that the company's objections be overruled. Following the company's filing of exceptions, the Board issued a Supplemental Decision and Certification Order on December 27, affirming the regional director's report and certifying the Pressmen as the collective bargaining representative of the company's employees.

On January 3, 1979, the Pressmen wrote to the company noting its certification as bargaining agent by the Board, and requesting the company to "enter into negotiations toward a new collective bargaining agreement at the earliest possible date." On January 24, 1979, the company replied, refusing to meet or to recognize the Pressmen because of the election irregularities. Since January 24, 1979, the

company has refused to bargain with the Pressmen. On July 3, 1979, the Board granted the General Counsel's motion for summary judgment.

Upon consideration of the entire record together with the briefs and oral arguments of counsel, the court concludes that the misrepresentation by the union in this case did not meet the four criteria set forth by the Board in Hollywood Ceramics, Co., Inc., 140 NLRB 221 (1962). That case held that the test for determining whether a misrepresentation is so egregious that an election must be voided [if]:

> ...an election shall be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact

> on the election. 140 NLRB at 224.

In applying the Hollywood Ceramics standard, the Fifth Circuit formulated that test as:

> ... (1) whether there has been a misrepresentation of a material fact; (2) whether the misrepresentation came from a party who was in an authoritative position to know the truth or who had special knowledge of the facts; (3) whether the other party in the election had an adequate opportunity to reply and to correct the misrepresentation.... Recently, this court added a fourth element to the test: whether the employees had independent knowledge of the misrepresented fact, so that they could effectively evaluate the propaganda. NLRB v. Southern Foods, Inc., 434 F.2d 717, 720 (5th Cir. 1970).

Although the handbill's reference to $1.00 and $1.50 differentials overstated the amount [of] the salary differences between the plants, it did convey the essentially correct message that the GAIU had won higher wages for its

members than the Pressmen. In fact, in one category, employees earned $1.51 more at the GAIU plant. Therefore, we conclude that the Board did not abuse its discretion when it determined that the misrepresentation was not material under the Hollywood Ceramics test.

The company contends that Diamond Electronics Division of Arvin Systems,Inc., v. National Labor Relations Board, 570 F.2d 156 (6th Cir. 1977), mandates a reversal of the Board's decision. We disagree. Diamond is distinguishable from the present case on its facts. There was no truth in the union's contention in Diamond that it had won a 40% increase in a single negotiation. Here, however, it is true that some GAIU members make $1.50 more than the Pressmen members. Most importantly, Diamond is distinguishable in that the union that misrepresented the increase there also won the election. There-

fore, it was more difficult for the Diamond court to conclude that the Board had not abused its discretion when it concluded that the misrepresentation did not affect the election result. Here, the GAIU did not win the election and the Pressmen, the current collective bargaining agent, did nothing to adversely affect the "laboratory conditions" of the election process.

Accordingly, we deny the company's petition for review and enforce the Board's order in full.

ENTERED BY ORDER OF THE COURT

s/JOHN P. HEHMAN
CLERK

KENNEDY, Circuit Judge, dissenting. I respectfully dissent. At the time of the election the GAIU was representing the employees in arbitration proceedings seeking back wages claimed to be owing. The GAIU handbill contained the following statement:

> As the company stated in their presentation to the employees, the GAIU has a case pending in Court regarding the "lost" $.45 wage increase. It would be to the Company's advantage if the GAIU was defeated in the election and would ultimately decide not to spend the remaining members' dues in an effort to collect the lost wage increase for its former members. This would relieve the Company of an approximately $4,000 pending liability per each affected member.

I agree with the dissenting member of the Board that this statement was "an impermissible threat . . . to abandon the bargaining representative's statutory duty

to represent the unit membership after the election." The majority of the Board, concentrating on the GAIU's intention, held that the intent of the language was to negate implications in an earlier letter of the employer. If found that

> [n]owhere does the Intervenor [GAIU] indicate an intention to abandon its efforts to collect the disputed wages.... [i]n our view, the Intervenor was merely describing what the Employer would wish to have happen should the Intervenor [GAIU] lose the election.

The problem with the Board's holding is that is not what the leaflet says. It does not say that this is what the employer wants the GAIU to do. Rather it threatens that this is what the GAIU will do if not re-elected. We must read the language as it would be likely to be understood by the ordinary reader. It is what was said that is important, not what was intended to be said. Certainly the statement here was "reasonably susceptible

of coercive implications." G. H. Hess, 82 N.L.R.B. 462 (1979). Our Court stated in Plastic Masters, Inc. v. N.L.R.B., 512 F.2d 449, 450 (6th Cir. 1975):

> . . . in our opinion the intent or absence of intent on the part of the Union to influence the employees' votes by the overpayments is not a controlling factor. Whether the conduct of the Union was intended to influence the vote, these actions "undoubtedly had a tendency to influence the election results." Collins S. Aikman Corp. v. N.L.R.B., 383 F.2d 722, 729 (4th Cir. 1967).

In a decision in which it relied on our Court's holding in Plastic Masters, the Fifth Circuit explained:

> The intent test is inconsistent with the logic behind these holdings [setting aside representation elections]. The effects of an act intended to influence an election may be so minimal that the outcome remains unaffected. Conversely an unintentional act may have such a deleterious effect on the conduct of an election that the result does not reflect the voters' free will.

> In determining whether an election should be invalidated, the focus should be on the effects of a particular act on the electorate rather than on the actor's intent.

N.L.R.B. v. Gulf State Canners, Inc., 585 F.2d 757, 759 (5th Cir. 1978).

The threat here could not but have a tendency to influence the outcome of the voting. Employees who might have wished to vote for "no union," as well as those who might have wished to vote for the Pressmen, may have voted for the GAIU so as not to lose their claims to the back wages. The panel fails to discuss the effect on the election of the Union's threat.

In addition, the majority of the Court suggests that the overstatements of the wage differential between Pressmen and GAIU plants were not misleading under Diamond Electronics Division of Arvin Systems, Inc. v. N.L.R.B., 570 F.2d 156 (6th Cir.

1977). The Board never analyzed the misleading nature of these statements. It simply asserted that the statements did not require setting the election aside. In Diamond the union overstated by 40 percent the wage increase it won in a bargaining session. Our Court ruled that "[t]his was a material misrepresentation with respect to wage rates, a matter of great concern to employees." Id. at 157. In this case the GAIU overstated the average wage differential between the GAIU represented Dayton plant and the Pressmen represented York and Fayetteville plants by 78 percent and 88 percent, respectively. This is more misleading than the statements at issue in Diamond.

The panel suggests the overstatements were not misleading because they conveyed the "essentially correct message that the GAIU had won higher wages for its members than the Pressmen." By the same token,

the overstatement at issue in Diamond conveyed the "essentially correct" message that the union had won a wage increase for its members. Diamond forecloses the conclusion that such an "essentially correct" message is not materially misleading. I also disagree that this case is distinguishable from Diamond merely because the otherwise misleading statements were accurate with respect to one out of thirty-five job categories.

The majority further states that Diamond is distinguishable in that the union making the misstatement in Diamond won the election while the GAIU which made the wage overstatement here was the loser in the runoff election. The majority's position appears to be based on the assumption that the GAIU's misleading statements could only have hurt the Pressmen; that they could not have influenced the employees to vote union in preference to "no

union." I disagree. The employees might well have believed that a company which paid its workers in different cities substantially different wages for comparable work is unfair, and that the protection of a union is necessary for employees of that company.

The GAIU received 20 votes less in the runoff election than it received in the first election. Had half of those 20 votes been given to the employer, the parties in the runoff election would have been the employer and the Pressmen. We can only speculate as to what the outcome of an election not influenced by material misrepresentations would have been. The Board should have required a new election. I would deny enforcement of the Board's order.

236 NLRB No. 75 JPM

D--3158
Dayton, Ohio

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE STANDARD REGISTER COMPANY

Employer

and

Case
9--RC--11852

THE DAYTON PRINTING AND
GRAPHIC COMMUNICATIONS
UNION, LOCAL 54, AFL--CIO

Petitioner

DECISION AND DIRECTION OF RUNOFF ELECTION

Pursuant to a Stipulation for Certification Upon Consent Election[1/] executed by

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1/ The appropriate bargaining unit set forth in the stipulation is as follows: "All employees in the letterpress room, Web Letterpress Division, including all apprentice pressmen, apprentice pre-pressmen, journeymen, floorman, and general workers, all employees operating transfer letterpresses used in production, including Building #7, all photo offset employees, offset (litho) pressmen, production employees in the planning and analyzation department, plumbers, all employees in what in now known as the Rubber Plate Department including journeymen platemakers, apprentices and general workers, all employed at

the parties[2/] and approved by the Acting Regional Director for Region 9 of the National Labor Relations Board on March 2, 1977, an election by secret ballot was conducted in the above-entitled proceeding on March 11, 1977, under the direction and supervision of said Acting Regional Director. Upon the conclusion of the election, a tally of ballots was furnished the parties in accordance with the Board's Rules and Regulations.

The tally of ballots show that there were approximately 152 eligible voters and that 52 ballots were cast for the Petitioner, 57 ballots were cast for the Intervenor, 40 ballots were cast for neither labor organization, and no ballots were challenged. Thereafter, the Employer filed

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1/ (cont'd)
the Employer's facility at 626 Albany Street, Dayton, Ohio, the only location of the Employer involved herein, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees."

2/ Graphic Arts International Union, Local 508, O--K--I, AFL--CIO, is the Intervenor in this proceeding.

timely objections to conduct affecting the results of the election.

On May 17, 1977, the Regional Director, having duly investigated the matters raised by the Employer's objections, issued and served on the parties his Report on Objections to Election and Recommendations to the Board in which he recommended that the Board overrule the Employer's objections in their entirety and that, as the tally of ballots revealed that none of the choices in the election received a majority of the valid votes cast, the Board direct a runoff election to be conducted between the choices which received the highest and the next highest number of votes, the Intervenor and the Petitioner, respectively. Thereafter, the Employer filed exceptions to the Regional Director's report.[3/]

[3/] While the instant matter was pending before the Board, the Intervenor advised the Board, subject to the Board's approval, of its disavowal of interest in representing the employees herein. The Intervenor and its International requested the Board's permission to allow the withdrawal of Local

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the exceptions and hereby adopts the Regional Director's findings and recommendations. As none of the choices on the ballot received a majority of the valid ballots cast, we shall direct a runoff election.

We agree with the Regional Director that the misrepresentations alleged in the Employer's objections are insufficient to

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3/ (cont'd)
508 O-K-I as the Intervenor and the substitution of the International as its successor in interest. We deny this request since we cannot assume that those employees who voted for Local 508, as Intervenor, would have voted for the International if it had been the Intervenor. See M. A. Norden Company, Inc., 159 NLRB 1730, 1731 (1966). This denial is without prejudice to further consideration, upon a proper showing, including employee consent, for substituting the International, in the event Intervenor wins the runoff election and is certified. See, e.g., Emery Industries, Inc. (Dice Road), 148 NLRB 51, 52-53 (1964).

set aside the election herein, relying, of course, on Shopping Kart Food Market, Inc., 228 NLRB No. 190 (1977). However, unlike Member Jenkins, we also agree with the Regional Director's conclusion that certain statements contained in a leaflet distributed by the Intervenor do not contain impermissible threats which warrant setting aside the election.

Since 1972, the Intervenor, the current collective-bargaining representative of the unit employees, has represented them in a non-Board proceeding in which it has asserted that the Employer is liable to unit members for certain wages. Shortly before the election herein, the Employer sent a letter to its employees which stated, in pertinent part:

> But do you remember the wage freeze: Those of you in the GAIU at that time had to fight your own unions to get it to do what was necessary to try to prevent further loss of more of your jobs. Even after you forced your local union leadership to change its mind and act in your best interests, the

> International ignored the clearly stated wishes of the majority and said it did not care what Standard's employees wanted or how necessary that wage freeze was to Standard's employees' job security. It would not agree to it. They are still spending dues money fighting that. Is that controlling your own destiny?

In response to this letter, the Intervenor distributed a leaflet containing the following passage:

> As the Company stated in their presentation to the employees, the GAIU has a case pending in Court regarding the "lost" $.45 wage increase. It would be to the Company's advantage if the GAIU was defeated in the election and would ultimately decide not to spend the remaining members' dues in an effort to collect the lost wage increase for its former members. This would relieve the Company of an approximately $4,000 pending liability per each affected member.

Member Jenkins claims that the Intervenor's response constitutes an implied threat that it would abandon its statutory duty to fairly represent unit employees un-

less it won the election. However, Member Jenkins has ignored the fact that the intent of Intervenor's response was to negate the unflattering implications left by the Employer's letter. Nowhere does the Intervenor indicate an intention to abandon its efforts to collect the disputed wages, which have presumably continued with the support of the employees. In our view, the Intervenor was merely describing what the Employer would wish to have happen should the Intervenor actually lose the election. The Intervenor's response recognized that it would be to the Employer's advantage if the Intervenor in fact relinguished its fight on behalf of the employees, for the Employer would thus be relieved of any financial liability to them. As recognized by the Regional Director, the Intervenor's abandonment of the wage dispute is remote, particularly in light of its ongoing efforts to pursue the matter. Accordingly, we cannot agree that there has been any

threat on the part of the Intervenor to abdicate its responsibility to fairly represent the unit employees.

DIRECTION OF RUNOFF ELECTION

It is hereby directed that the Regional Director for Region 9 shall conduct a runoff election at a time and place to be determined by him, among certain employees of the Employer who were employed during the payroll period used in the prior election in the stipulated unit to determine whether they desire to be represented for the purposes of collective bargaining by The Dayton Printing and Graphic Communications Union, Local 54, AFL--CIO, or by Graphic Arts International Union, Local 508, O--K--I, AFL--CIO.

Dated, Washington, D.C. June 2, 1978

John A. Penello, Member

Betty Southard Murphy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JENKINS, dissenting in part:

I agree with my colleagues' adoption of the Acting Regional Director's finding that the misrepresentations alleged in the Employer's objections are insufficient to affect the results of the election, but do so in reliance on the standards set forth in Hollywood Ceramics Company, Inc., 140 NLRB 221 (1962), and not on Shopping Kart Food Market, 228 NLRB No. 190 (1977). Contrary to my colleagues, however, I find that the Intervenor's leaflet contained an impermissible threat which requires setting aside the election and directing a second election.

Since 1972 the Intervenor, the current collective-bargaining representative, has represented unit employees in an arbitration proceeding seeking back wages claimed to be owing. On the day before the election, the Intervenor circulated to the voters a leaflet which read, in pertinent part, as follows:

> As the Company stated in their presentation to the employees, the GAIU has a case pending in Court regarding the "lost" 45 cent wage increase. It would be to the Company's advantage if the GAIU was defeated in the election and would ultimately decide not to spend the remaining members' dues in an effort to collect the lost wage increase for its former members. This would relieve the Company of an approximately $4,000 pending liability per each affected member.

The above passage was obviously intended to advise the voters that the Intervenor's loss of the election could well cause the Intervenor to abandon further efforts, as their bargaining representative, to collect their back-pay claims which it estimated to be worth approximately $4,000 per individual. In my view the language in the leaflet clearly constituted an implied threat to abandon the bargaining representative's statutory duty fairly to represent the

unit membership after the election [4/] unless the Intervenor won the election and thus interfered with the employees' right to express their wishes in the election free of coercion. I would therefore set aside the election and direct a second election.

Dated, Washington, D.C. June 2, 1978

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

[4/] See Red Ball Motor Freight, Inc., 157 NLRB 1237 (1966).

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE STANDARD REGISTER COMPANY

Employer

and Case 9--RC--11852

THE DAYTON PRINTING AND GRAPHIC COMMUNICATIONS UNION, LOCAL 54, AFL--CIO

Petitioner

SUPPLEMENTAL DECISION
AND
CERTIFICATION OF REPRESENTATIVE

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held on July 14, 1978,[1/] and

1/ The election was conducted pursuant to the Board's Decision and Direction of Runoff Election (236 NLRB No. 75 (1978)). The tally was 73 for the Petitioner and 37 for Graphic Arts International Union, Local 508, O-K-I, AFL--CIO--CLC, the

the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief, and hereby adopts the Regional Director's findings and recommendations.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for The Dayton Printing and Graphic Communications Union, Local 54, AFL--CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All employees in the letterpress room, Web Letterpress Division,

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1/ (cont'd.) Intervenor. There were 10 challenged ballots, an insufficient number to affect the results.

including all apprentice pressmen, apprentice pre-pressmen, journeymen, floormen, and general workers, all employees operating transfer letterpresses used in production, including Building #7, all photo offset employees, offset (litho) pressmen, production employees in the planning and analyzation department, plumbers, all employees in what is now known as the Rubber Plate Department including journeymen, platemakers, apprentices and general workers, all employed at the Employer's facility at 626 Albany Street, Dayton, Ohio, the only location of the Employer involved herein, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

Dated, Washington, D.C. December 27, 1978.

John H. Fanning, Chairman

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JENKINS, dissenting:

The majority has overruled the objections to the runoff election conducted by the Board on July 14, 1978, and has certified the Petitioner as the bargaining representative for the employees in the unit found appropriate. When this case was initially before us on objections to the first election,[2/] I dissented from the majority's failure to find that a leaflet circulated the day before the election contained an implied threat to abandon the bargaining representative's statutory duty to fairly represent the unit membership after the election and that the election should be set aside on the basis of this conduct. For the reasons stated in my earlier dissent, and in particular my conclusion that a second election and not a runoff election was required, I am unable to join

2/ The Standard Register Company, 236 NLRB No. 75 (1978).

in the result reached by my colleagues.

Dated, Washington, D.C. December 27, 1978.

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

243 NLRB No. 32

JPM
D-5137
Dayton, OH

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE STANDARD
REGISTER COMPANY

and Case 9-CA-13400

THE DAYTON PRINTING
AND GRAPHIC COMMUNICATIONS
UNION, LOCAL 54, AFL-CIO

DECISION AND ORDER

Upon a charge filed on January 23, 1979, by The Dayton Printing and Graphic Communications Union, Local 54, AFL-CIO, herein called the Union, and duly served on The Standard Register Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint on February 8, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within

the meaning of Section 8(a)(5) and (1) and Section 1(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on December 27, 1978, following a Board election in Case 9-RC-11852, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; 1/ and that,

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1/ Official notice is taken of the record in the representation proceeding, Case 9-RC-11852, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d

commencing on or about January 11, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On February 19, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 12, 1979, counsel for the General Counsel filed directly with the Board a Motion to Strike Portions of Respondent's Answer and Motion for Summary Judgment. Subsequently, on March 15, 1979, the Board issued an order

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1/ 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C. Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion to Strike Portions of Respondent's Answer and Motion for Summary Judgment

In its response to the Notice To Show Cause, Respondent contends that granting the General Counsel's Motion to Strike Portions of Respondent's Answer and Motion for Summary Judgment would deny Respondent the opportunity to present evidence at a hearing conducted by an administrative law judge and would be contrary to the due

process clause of the Constitution of the United States and established precedent of the National Labor Relations Board.

The General Counsel's basic position with respect to his motion to strike portions of Respondent's answer to the complaint is that some of Respondent's denials are plainly contrary to the facts and the official record and are, accordingly, subject to a motion to strike. While, for reasons stated below, we find Respondent's answer to the complaint does not present a meritorious defense to the allegations of the complaint, we do not believe any portion of the answer should be struck. In our judgment, Respondent's answer can be viewed as an endeavor by Respondent to preserve a position, albeit, in our view, an erroneous one. See Grant's Furniture Plaza, Inc. of West Palm Beach, Florida, 220 NLRB 1092 (1975), citing Rod-Ric Corporation, 171 NLRB 922,

924 (1968). The motion to strike is therefore denied.

With respect to his Motion for Summary Judgment, the General Counsel's basic position is that all issues in dispute were decided in the representation proceeding and that, accordingly, he is entitled to summary judgment as a matter of law.

In its opposition to the motion, Respondent contends that it is entitled to present evidence at a hearing, and that the denial of such a hearing would be contrary to the due process clause of the Constitution of the United States and established precedent of the National Labor Relations Board.

In our opinion the truth of the allegations of the complaint either has been expressly admitted by Respondent in its answer, or stands admitted by virtue of the uncontroverted factual averments in General Counsel's motion and the

attachments thereto. The record before us shows that:

1. On December 27, 1976, Dayton Printing Pressmens Union Local #54,[2] herein called the Union, filed a petition in Case 9-RC-11852, seeking to represent employees in a unit stipulated by the prties to be an appropriate unit for collective-bargaining purposes.

2. On or about March 2, 1977, the Regional Director approved a Stipulation for Certification Upon Consent Election executed by the parties including Graphic Arts International Union, Local 508, O-K-I, AFL-CIO-CLC, herein called the intervenor. The appropriate unit was stipulated to be:

> All employees in the letterpress room, Web Letterpress Division, including all apprentice pressmen, apprentice pre-pressmen,

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[2] At the time of the execution of the stipulation, the Union's name was changed to The Dayton Printing and Graphic Communications Union, Local 54, AFL-CIO.

> journeymen, floormen, and general workers, all employees operating transfer letterpresses used in production, including Building #7, all photo offset employees, offset (litho) pressmen, production employees in the planning and analyzation department, plumbers, all employees in what is now known as the Rubber Plate Department including journeymen platemakers, apprentices and general workers, all employed at the Employer's facility at 626 Albany Street, Dayton, Ohio, the only location of the Employer involved herein, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

3. On March 11, 1977, an election was held in the above-described unit resulting in 52 votes being case for the Union, 57 votes being case for the Intervenor, and 40 votes cast against the participating labor organizations. There were no challenged ballots.

4. On May 17, 1977, the Regional Director, having duly investigated the matters raised by the Employer's objections, issued and served on the parties his report on objections wherein he

recommended that the objections be overruled in their entirety and that, as the tally of ballots revealed that none of the choices in the election received a majority of the valid votes cast, the Board direct a runoff election to be conducted between the Intervenor and the Union, the two choices receiving the higher number of votes.

5. Thereafter, the Employer filed exceptions to the Regional Director's report with the Board, and, thereafter, on June 2, 1978, a panel majority of the Board[3/] issued a Decision and Direction of Runoff Election directing the Regional Director to hold a runoff election between the Intervenor and the Union.

6. On July 14, 1978, a runoff election was held in which 73 ballots were

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3/ 236 NLRB No. 75. Member Jenkins dissented on the ground that in his opinion a pamphlet circulated by the Intervenor the day before the election carried an impermissible threat which required that the election be set aside and a second election held.

cast for the Union, 37 ballots were cast for the Intervenor, and 10 ballots were challenged, an insufficient number to affect the results of the election.

7. On August 14, 1978, the Employer filed timely objections to the runoff election asserting, inter alia, as objectionable conduct occurring prior to the initial election held on March 11, 1977, and treated in those proceedings, conduct related to the Board's directing of a runoff election, the holding of the same, and procedural matters involved therein, and alleging improper conduct by the Board agent conducting the election. On September 19, 1978, the Regional Director, having duly investigated and considered the issues raised by the Employer's objections, issued and served on the parties his Report on Objections to Runoff Election and Recommendations to the Board wherein he recommended that the objections be overruled in their entirety and that

the Union be certified as the employees' collective-bargaining representative.

8. Thereafter, the Employer filed with the Board exceptions to the Regional Director's report and recommendations and, thereafter, on December 27, 1978, a panel majority of the Board[4/] issued a Supplemental Decision and Certification of Representative, certifying the Union as the collective-bargaining representative of the employees in the appropriate unit.

9. On January 3, 1979, the Union wrote Respondent referring to its certification as bargaining agent by the Board and requested that it and Respondent "enter into negotiations toward a new collective bargaining agreement at the earliest possible date."

10. On January 24, 1979, Respondent wrote the Union acknowledging the Union's

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4/ 239 NLRB No. 157, Member Jenkins dissenting.

letter of January 3, 1979, stating further:

> As you no doubt recognize, The Standard Register Company disagrees with the decision of the National Labor Relations Board in the matter of The Standard Register Company's objections to conduct by the Intervenor affecting the results in the representation case. In view of The Standard Register Company's disagreement with the decision in that matter, it is unable to recognize your organization at this time as the representative of an uncoerced majority of its employees in an appropriate unit as a result of a properly conducted National Labor Relations Board secret ballot election.
>
> In light of the above, it does not appear that a meeting for the purpose of negotiating or concluding a collective bargaining agreement at this time would be appropriate.

11. On February 23, 1979, after receiving Respondent's answer to the complaint, the General Counsel wrote Respondent with regard to Respondent's denial of paragraphs 6 and 8 of the complaint. The second paragraph of the General Counsel's letter states:

> The purpose of this letter is to attempt to clairfy your position in the matter. Attached hereto is a copy of a letter dated January 11, 1979, [sic] addressed to Mr. Clark of the Union and signed by N.C. Young, Director of Industrial Relations. Do you dispute the authenticity of this letter or do you acknowledge that this letter was mailed to the Union in response to its January 3 request letter. Is it Respondent's position by your Answer to paragraph 8 of the Complaint that you are not refusing to recognize and bargain with the Union, and conversely are willing to now begin bargaining, or that you wish to test the Board's certification of the Union, as your Answer to paragraph 6 would seem to indicate.

12. On March 2, 1979, Respondent's counsel responded to the General Counsel's letter as follows:

> In response to your letter of February 23, 1979, please be advised that the Respondent, The Standard Register Company, does not dispute the authenticity of the letter from N.C. Young, Director, Industrial Relations, to William M. Clark, Secretary-Treasurer and Business Representative of Dayton Printing & Graphic Communications Union No. 54. Respondent also acknowledges that Mr. Young's January 11, 1979, [sic] letter, a copy

> of which was attached to your letter of February 23, 1979, to me, was mailed to the union.
>
> With respect to the remainder of the inquiries in your letter of February 23, 1979, it appears that they go to evidentiary matters. As Counsel for General Counsel has consistently and successfully argued to the Administrative Law Judges and the Board, evidentiary matters are for the hearing and not for the Complaint and Answer. Respondent has already filed its Answer in this matter.

Based on the above facts, and the entire record before us, we find Respondent has failed to set forth specific facts showing that there is a genuine issue for hearing. The only conceivable issue concerns the allegedly objectionable conduct raised in Respondent's objections to both the first election and the runoff election, which Respondent contends, as of January 24, 1979, invalidates the Union's certification. We have previously rejected these contentions as lacking in merit. As Respondent has not alleged any further facts requiring modification of our

conclusions, it is clear that, by now seeking an evidentiary hearing, Respondent seeks only to relitigate matters heretofore resolved in the representation case. In the circumstances of this case, such an evidentiary hearing is not warranted and "would be an exercise in futility."[5/]

Respondent next contends that, even if all issues "which remain to be resolved in the present unfair labor practice case have been presented at the representation proceeding," it is not precluded from raising these issues in an unfair labor practice proceeding. In support of its position, it cites Russell-Newman Manufacturing Co., Inc., 158 NLRB 1260 (1966), and J.J. Newberry Company, 196 NLRB 995 (1972). In our opinion, nothing in these decisions supports Respondent's contention. In Russell-Newman Manufacturing

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5/ E-Z Davies Chevrolet, 161 NLRB 1380, 1383 (1966), enfd. 395 F.2d 191 (9th Cir. 1968).

Co., Inc., the relative truth of the campaign literature was in issue. In J.J. Newberry Company, the supervisory status of area managers, which has not been resolved in the representation proceeding, was in issue. There are not such issues present in the instant case.6/ Respondent also contends that the pleadings clearly establish that substantial and material issues of fact exist, that these issues were not present in the representation proceeding, and that these issues are a necessary part of the proof which the General Counsel must establish at a hearing. We find this contention equally without merit. At no time does Respondent suggest what these issues are, nor does Respondent suggest or contend that it is prepared to present newly discovered or previously unavailable evidence, the

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6/ E-Z Davies Chevrolet, supra at 1384.

availability of which might conceivably require a hearing. As we said in E-Z Davies Chevrolet, supra at 1383:

> An evidentiary hearing is not a matter of right where there is nothing that a trier of fact may determine.

We also find no merit in Respondent's contention that the denial of a hearing at this stage of these proceedings would be contrary to the due process clause of the United States Constitution.7/

For all of these reasons, we conclude that our refusal to hold a hearing herein offends no statutory or constitutional right.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which

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7/ Ibid.

were or could have been litigated in a prior representation proceeding.8/

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

8/ See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent, an Ohio corporation, is engaged in printing business forms at various locations in the United States, including its Dayton, Ohio, facility. During the past 12 months, a representative period, Respondent sold and shipped goods and materials, valued in excess of $50,000, from its Dayton, Ohio, facility directly to customers outside the State of Ohio.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

The Dayton Printing and Graphic Communications Union, Local 54, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees in the letterpress room, Web Letterpress Division, including all apprentice pressmen, apprentice pre-pressmen, journeymen, floormen, and general workers, all employees operating transfer letterpresses used in production, including Building #7, all photo offset employees, offset (litho) pressmen, production employees in the planning and analyzation department, plumbers, all employees in what is now known as the Rubber Plate Department including journeymen platemakers, apprentices and general workers, all employed at the Employer's facility at 626 Albany Street, Dayton, Ohio, the only location of the Employer involved herein,

but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

2. The certification

On July 14, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 9 designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 27, 1978, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about January 3, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of

all the employees in the above-described unit. Commencing on or about January 24, 1979, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since January 24, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in

connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we

shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the approprite unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record makes the following:

Conclusions of Law

1. The Standard Register Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Dayton Printing and Graphic Communications Union, Local 54, AFL-CIO,

is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees in the letterpress room, Web Letterpress Division, including all apprentice pressmen, apprentice pre-pressmen, journeymen, floormen, and general workers, all employees operating transfer letterpresses used in production, including Building #7, all photo offset employees, offset (litho) pressmen, production employees in the planning and analyzation department, plumbers, all employees in what is now known as the Rubber Plate Department including journeymen platemakers, apprentices and general workers, all employed at the Employer's facility at 626 Albany Street, Dayton, Ohio, the only location of the Employer involved herein, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate

for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 27, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 24, 1979 and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing,

employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Standard Register Company, Dayton, Ohio, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment

with The Dayton Printing and Graphic Communications Union, Local 54, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees in the letterpress room, Web Letterpress Division, including all apprentice pressmen, apprentice pre-pressmen, journeymen, floormen, and general workers, all employees operating transfer letterpresses used in production, including Building #7, all photo offset employees, offset (litho) pressmen, production employees in the planning and analyzation department, plumbers, all employees in what is now known as the Rubber Plate Department including journeymen platemakers, apprentices and general workers, all employed at the Employer's facility at 626 Albany Street, Dayton, Ohio, the only location of the Employer involved herein, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Dayton, Ohio, facility copies of the attached notice marked "Appendix."[9/] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly

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9/ In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. July 3, 1979

John A. Penello, Member

Betty Southard Murphy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JENKINS, dissenting:

The majority has concluded that Respondent has violated Section 8(a)(5) of the Act by refusing to bargain with the Union. I agree with my colleagues' finding that Respondent refused to bargain with the Union and that its refusal to so bargain was predicated on its position that the Union's certification is invalid. When this case was initially before us on objections to the first election, I dissented from the majority's failure to find that a leaflet, circulated the day before the election, contained an implied threat to abandon the bargaining representative's statutory duty to fairly represent the unit membership after the election and that the election should be set aside on the basis of this conduct. When this case was before us again on objections to the runoff election, I again dissented, based on the reasons stated in my earlier dissent, and in particular my conclusion

that a second election and not a runoff election was required. Since the runoff election was improperly directed, the Union's certification is invalid, and Respondent had the right to refuse to bargain with the Union. Accordingly, I dissent from my colleagues' finding that Respondent violated Section 8(a)(5) of the Act.

Dated, Washington, D.C. July 3, 1979

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with The Dayton Printing and Graphic Communications Union, Local 54, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees in the letterpress room, Web Letterpress Division, including all apprentice pressmen, apprentice pre-pressmen, journeymen, floormen, and general workers, all employees operating transfer letterpresses used in production, including Building #7, all photo offset employees, offset (litho) pressmen, production employees in the

planning and analyzation department, plumbers, all employees in what is now known as the Rubber Plate Department including journeymen platemakers, apprentices and general workers, all employed at the Employer's facility at 626 Albany Street, Dayton, Ohio, the only location of the Employer involved herein, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

THE STANDARD REGISTER COMPANY
(Employer)

Dated _____

By: _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 3003, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3663.

246 NLRB No. 54

D--5775
Dayton, OH

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE STANDARD REGISTER COMPANY

and Case 9-CA-13400

THE DAYTON PRINTING AND GRAPHIC COMMUNICATIONS UNION, LOCAL 54, AFL--CIO

SUPPLEMENTAL DECISION AND ORDER

On July 3, 1979, the National Labor Relations Board issued a Decision and Order [1/] in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, and ordering Respondent to cease and desist therefrom and take certain affirmative

[1/] 243 NLRB No. 32.

action to remedy such unfair labor practices. On July 5, 1979, Respondent filed with the United States Court of Appeals for the Sixth Circuit a petition to review the Board's Order. Thereafter, the Board decided, sua sponte, to reconsider its decision in the above case in light of its Decision in General Knit of California, Inc., 239 NLRB No. 101 (1978).

In the underlying representation proceeding, the Board, Member Penello and Murphy, with Member Jenkins dissenting in part, overruled Respondent's objections to the election held on March 11, 1977, [2] and to the runoff election held on July 14, 1978.[3] In overruling Respondent's objections to the initial election, the panel majority affirmed the Regional Director's application of Shopping Kart Food Market, Inc., 228 NLRB 1311 (1977), to Respondent's objections to the election

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[2] 236 NLRB No. 75 (1978).

[3] 239 NLRB No. 157 (1978).

which were based on alleged misrepresentations. On December 6, 1978, the Board issued General Knit of California, supra, which reversed Shopping Kart, and reaffirmed the criteria set forth in Hollywood Ceramics Company, Inc., 140 NLRB 221 (1962), for determining the validity of objections based on alleged misrepresentations. As noted above, the Board decided to reconsider its Decision and Order in light of General Knit of California. On August 9, 1979, the Board notified the parties of this action. On August 27, 1979, Respondent filed a "Statement of Position In Support of Modification, Suspension or Setting Aside of the Board's Decision and Order."

Members Penello and Murphy have reconsidered the entire record in this proceeding and adhere to their position taken in the underlying representation case that Respondent's objections were without merit and, specifically, that the alleged mis-

representations, even if established, did not warrant setting aside the election under Shopping Kart, supra. Chairman Fanning and Member Truesdale have carefully considered the entire record, including that in the underlying representation case, and agree with Members Penello and Murphy that Respondent's objections are without merit. In reaching this result, they find that, under the standards of Hollywood Ceramics, supra, Respondent's objections do not require either that the election be set aside or that a hearing be held. Thus, assuming the truth of Respondent's misrepresentation objections, they find that the Union's statements constituted normal election propaganda which was not substantially or materially misleading.

In view of the foregoing, the Board concludes that under either the standards of Shopping Kart, supra, adhered to by Members Penello and Murphy, or the standards of Hollywood Ceramics, supra, ad-

hered to by Chairman Fanning and Member Truesdale (and concurred in by Member Jenkins infra), Respondent's objections are without merit; that the Union was properly certified as the representative of the unit employees; that Respondent's failure and refusal to recognize and bargain with the Union violated the Act as alleged; and that the General Counsel's Motion for Summary Judgment was properly granted. Accordingly, the Board reaffirms the initial Decision and Order in this case and shall order that Respondent comply with the provisions of that Order. 4/

4/ Member Jenkins agrees with Chairman Fanning and Member Truesdale that the alleged misrepresentations concerning wage rates at other plants are not objectionable under Hollywood Ceramics, and notes that the Employer considers that the Intervenor Union's alleged threat to abandon representation of the employees is not presented at this stage of the proceeding.

Member Truesdale indicates that, were the issue before him, he would find without merit that portion of Respondent's objections concerning the alleged threat by the Intervenor Union to abandon representation of the employees, for the reasons previously expressed by Members Penello and Murphy in the Board's Decision and Direction of Runoff Election, reported at 236 NLRB No. 75 (1978).

ORDER

It is hereby ordered that the Respondent, The Standard Register Company, Dayton, Ohio, take that action ordered in, and otherwise comply with the provisions of, the Order in this proceeding issued on July 3, 1979, reported at 243 NLRB No. 32.

Dated, Washington, D.C. October 29, 1979.

John H. Fanning, Chairman

Howard Jenkins, Jr. Member

John A. Penello, Member

Betty Southard Murphy, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

79-1368

United States Court of Appeals

for the Sixth Circuit

Filed
June 29, 1981
John P. Hehman,
Clerk

STANDARD REGISTER CO.,

Plaintiff-Appellant,

v. O R D E R

NATIONAL LABOR RELATIONS BOARD,

Defendant-Appellee.

BEFORE: KEITH, BROWN and KENNEDY, Circuit Judges

The court not having voted in favor of a rehearing en banc, the petition for rehearing heretofore filed by the appellant has been referred to the panel which heard the appeal.

Upon consideration, the court concludes that the issues raised in the

petition for rehearing were fully considered upon the original submission and decision of the appeal. Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

s/John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. 79-1368

FILED
July 29, 1981
John P. Hehman,
Clerk

STANDARD REGISTER COMPANY,	:	
Petitioner,	:	
vs	:	O R D E R
NATIONAL LABOR RELATIONS BAORD,	:	
Respondent.	:	

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari

petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

s/Leonard Green
Chief Deputy Clerk

APPENDIX B
National Labor Relations Act,
29 U.S.C. §§ 159, 158(a)(1),
5,(b)(1)(A)

§ 157 Rights of Employees

Employees shall have the right to self-organization, to for, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition or employment as authorized in section 8(a)(3).

§ 158 Unfair Labor Practices

a. It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

b. It shall be an unfair labor practice for a labor organization its agents -

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of August, 1981, caused three (3) copies of the foregoing PETITION FOR A WRIT OF CERTIORARI to be served upon the following persons by depositing copies of same in the United States Mail, postage prepaid, addressed as follows:

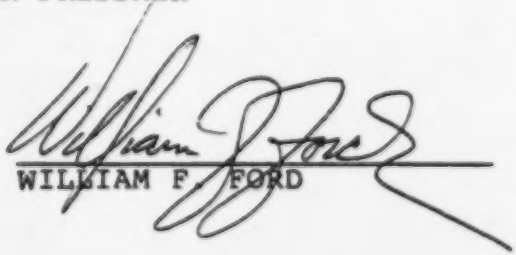
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Office - Supreme Court, U.S.
FILED
NOV 20 1981
ALEXANDER L. STEVAS
CLERK

No. 81-399

In the Supreme Court of the United States

OCTOBER TERM, 1981

STANDARD REGISTER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board abused its discretion in overruling petitioner's objections to a representation election based on allegedly material misrepresentations and threats by one of the unions involved in the election.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 6

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Diamond Electronics Division of Arvin Systems, Inc. v. *NLRB*, 570 F. 2d 156 8

Ex-Cell-O Corp. v. *NLRB*, 449 F. 2d 1058 9

Follett Corp. v. *NLRB*, 397 F. 2d 91 9

Gallenkamp Stores Co. v. *NLRB*, 402 F. 2d 525 9

General Knit of California, 239 N.L.R.B. 619 ..... 4, 5, 7

Graphic Arts Finishing Co. v. *NLRB*, 380 F. 2d 893 9

Hollywood Ceramics Co., 140 N.L.R.B. 221 ..... 4, 5, 6, 7, 8, 9

J.I. Case Co. v. *NLRB*, 555 F. 2d 202 9

Jeffrey Manufacturing Co., 180 N.L.R.B. 701 9

Linn v. *United Plant Guard Workers of America, Local 114*, 383 U.S. 53 7

NLRB v. *A.J. Tower Co.*, 329 U.S. 324 6

NLRB v. *Millard Metal Service Center, Inc.*, 472 F. 2d 647 9

Page

Cases—(Continued):

NLRB v. *Van Gorp Corp.*, 615 F. 2d 759 10

National Waterlift Co., 175 N.L.R.B. 849 9

Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311 ..... 4, 5

Stewart Warner Corp., 102 N.L.R.B. 1153 7

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 9

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

Section 8(a)(1), 29 U.S.C. 158(a)(1) 4
Section 8(a)(5), 29 U.S.C. 158(a)(5) 4

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 649 F. 2d 412. The Board's decision and order (Pet. App. 33a-64a) are reported at 243 N.L.R.B. 300. The Board's supplemental decision and order (Pet. App. 67a-72a) are reported at 246 N.L.R.B. 317.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on May 14, 1981, and the petition for rehearing was denied on June 29, 1981 (Pet. App. 73a-74a). The petition for a writ of certiorari was filed on August 28, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. Petitioner prints business forms at plants in Dayton, Ohio and other locations in the United States. Its Dayton

employees traditionally had been represented by Graphic Arts International Union Local 508, O-K-I, AFL-CIO ("GAIU"). Employees at petitioner's other plants traditionally had been represented by the Dayton Printing and Graphic Communications Union Local 54, AFL-CIO ("the Pressmen"). Pet. App. 2a, 21a. In December, 1976, the Pressmen filed a petition with the Board seeking to represent petitioner's Dayton printing press employees. GAIU intervened in the election proceeding. A representation election was conducted at the Dayton plant on March 11, 1977, with both unions and "neither" on the ballot. Pet. App. 2a, 39a-40a. The results of the election were 57 votes for GAIU, 52 votes for the Pressmen, and 40 votes for neither union. Because none of the three choices obtained a majority of the valid votes cast, Board procedures required a runoff election between the two choices that received the most votes—GAIU and the Pressmen. Pet. App. 3a, 18a-19a, 40a-41a.

b. Petitioner filed objections to the first election, however, contending that GAIU had threatened to abandon its duty to represent the bargaining unit employees in pressing certain back pay claims if it should lose the election and had misrepresented the amount by which its members' wages exceeded those of employees at petitioner's other plants, who were represented by the Pressmen. Pet. App. 3a, 4a, 19a-20a, 41a. Both objections were based on a single handbill, distributed by GAIU the day before the election (*id.* at 3a-4a).[1] In its objections, petitioner asserted that the

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[1]The handbill stated in pertinent part (Pet. 3, 4-5):

> It was reported that [a Pressmen] International Representative revealed at their beer party that the Standard Register Company employees in York, Pa. are receiving approximately $1.00 per hour less than the Dayton employees and in Fayetteville the difference is approximately $1.50 per hour less. That figures out to

wage difference between Dayton and York ranged from approximately $.01 to approximately $.98, rather than the $1.00 claimed by GAIU, while the difference at Fayetteville and Dayton ranged from $.26 to $1.21, rather than the $1.50 cited in the leaflet.

The Board overruled the objections and ordered that the runoff election be held (Pet. App. 24a). The Board found (Pet. App. 23a) that the reference in the handbill to the back pay claims was in response to a letter petitioner had sent to each of its employees shortly before the election about this very issue (Pet. App. 21a-22a). In its letter, petitioner had charged that GAIU's pursuit of the claim for back pay, in lieu of accepting a wage freeze that petitioner contended would preserve jobs, was not in the best interest of the employees (*id.* at 22a). In the Board's view, the passage in GAIU's handbill simply negated the "unflattering implications left by [petitioner's] letter" (*id.* at 23a) and did not constitute a threat to abandon the claims. The Board explained (Pet. App. 23a-24a):

> Nowhere does [GAIU] indicate an intention to abandon its effort to collect the disputed wages, which have presumably continued with the support of the employees. In our view, [GAIU] was merely describing what

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be $37.50 less per week or $1,950.00 less per year in York, Pa., and $56.25 less per week or $2,925.00 less per year in Fayetteville, Arkansas.

* * * * *

As the Company stated in their presentation to the employees, the GAIU has a case pending in the Court regarding the "lost" $.45 wage increase. It would be to the Company's advantage if the GAIU was defeated in the election and would ultimately decide not to spend the remaining members' dues in an effort to collect the lost wage increase for its former members. This would relieve the Company of approximately $4,000 pending liability per each affected member.

> [petitioner] would wish to have happen should [GAIU] actually lose the election. [GAIU's] response recognized that it would be to [petitioner's] advantage if [GAIU] in fact relinquished its fight on behalf of the employees, for [petitioner] would thus be relieved of any financial liability to them. As recognized by the Regional Director, [GAIU's] abandonment of the wage dispute is remote, particularly in light of its ongoing efforts to pursue the matter. Accordingly, we cannot agree that there has been any threat on the part of [GAIU] to abdicate its responsibilities to fairly represent the unit employees.[2]

The Board also concluded that the inaccurate wage rate comparison did not warrant setting aside the election under its recent decision in *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977), in which the Board had concluded that, absent especially aggravated circumstances, it would "no longer set elections aside on the basis of misleading campaign statements" (*id.* at 1313).[3]

c. The Pressmen won the runoff election by a vote of 73 to 37 (Pet. App. 4a, 41a-42a). Petitioner reasserted the same objections it had filed after the first election, but the Board again overruled these objections and certified the Pressmen as bargaining representative of petitioner's Dayton unit employees (Pet. App. 5a, 29a-30a). Petitioner then refused to bargain with the Pressmen. The Board found that petitioner thereby violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to bargain with the Pressmen (Pet. App. 5a-6a, 54a-60a).

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[2]Member Jenkins dissented on this ground, disagreeing with the majority's reading of the handbill.

[3]In so holding in *Shopping Kart*, the Board overruled the test announced in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962), quoted at note 4, *infra*. Subsequently, in *General Knit of California*, 239 N.L.R.B. 619 (1978), the Board overruled *Shopping Kart* and announced that it once again would follow the *Hollywood Ceramics* test. See page 5, *infra*.

After the Board issued its decision in this case, it decided *General Knit of California*, 239 N.L.R.B. 619 (1978), which overruled *Shopping Kart Food Market, supra*, and reinstated the test established in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962), for determining when pre-election misrepresentations would require setting aside an election. See note 3, *supra*. Because the Board had considered the misrepresentation issue in this case under the less stringent test of *Shopping Kart*, the Board, sua sponte, reconsidered that issue. After reviewing the entire record in the case, the Board concluded that "under the standards of *Hollywood Ceramics, supra*, [petitioner's] objections do not require that the election be set aside" because "[GAIU's] statements constituted normal election propaganda which was not substantially or materially misleading" (Pet. App. 70a).

2. The court of appeals, with Judge Kennedy dissenting, upheld the Board's decision and enforced its order (Pet. App. 9a). The court concluded that the Board had properly applied the *Hollywood Ceramics* test in concluding that GAIU's statement concerning the pay rates was not a material misrepresentation requiring that the election be set aside. The court stated (Pet. App. 7a-8a):

> Although the handbill's reference to $1.00 and $1.50 differentials overstated the amount [of] the salary differences between the plants, it did convey the essentially correct message that the GAIU had won higher wages for its members than the Pressmen. In fact, in one category, employees earned $1.51 more at the GAIU plant. Therefore, we conclude that the Board did not abuse its discretion when it determined that the misrepresentation was not material under the *Hollywood Ceramics* test.

ARGUMENT

1. Petitioner contends (Pet. 19-38) that the first election should have been set aside because of the statements in GAIU's handbill regarding differences between the wage rates at petitioner's Dayton plant and those at the York and Fayetteville plants, where the employees were represented by the Pressmen. None of the five Board members who considered this issue at various stages of review agreed with this contention (see Pet. App. 20a-21a, 25a, 31a-32a, 63a-64a, 69a-71a & n.4), and there is no reason for this Court to consider it.

As this Court has made clear, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representative by employees" (*NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946)). In exercising this discretion, the Board has determined that an election should be set aside on the basis of campaign representations only in circumstances satisfying the test enunciated in *Hollywood Ceramics*,[4] *supra*, which the Board recently reaffirmed in *General Knit, supra*.

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[4]In *Hollywood Ceramics*, the Board explained (140 N.L.R.B. at 244; footnote omitted):

> We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside. Such ambiguities, like extravagent promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons. But even when a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all circumstances that the statement would not be likely to have had a real impact on the election.

Guided by the *Hollywood Ceramics* principles, the Board refrains from interfering in the election process because of misstatements except when they "may reasonably be said to have a significant impact on the election" (140 N.L.R.B. at 244). As this Court has noted, "the Board does not 'police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements' " (*Linn* v. *United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 60 (1966), quoting *Stewart Warner Corp.*, 102 N.L.R.B. 1153, 1158 (1953)).

Petitioner does not challenge the legal principles set forth in *Hollywood Ceramics* (see Pet. 19-20); rather petitioner contends that the Board and the court of appeals erred in applying those principles in the particular circumstances of this case. There is no merit to that contention.

First, petitioner seizes upon the court of appeals' statement that the reference in GAIU's handbill to the wage differential was "essentially correct" and argues (Pet. 23-24) that this language announces a test different from that in *Hollywood Ceramics*. But this contention is contradicted by the language of the court of appeals' opinion itself, in which the court expressly *invoked* the *Hollywood Ceramics* test (see Pet. App. 6a-8a). The court's explanation that GAIU's statement about the wage differential was "essentially correct" is but another way of expressing the second prong of the *Hollywood Ceramics* test, which requires, as a condition for setting aside the election, that the statement involve "a substantial departure from the truth." See note 4, *supra*. Thus, contrary to petitioner's assertion (Pet. 26-27), the court of appeals' opinion does not suggest that the court would sanction *any* statement so long as there is some element of truth to it, no matter how slight.

Nor did the court evidence a departure from the *Hollywood Ceramics* test by referring to the fact that the Pressmen ultimately won the second election in determing that GAIU's misrepresentation did not have an adverse impact on the election process. *Hollywood Ceramics* requires a showing of "a significant impact on the election" before an election will be set aside. The fact that GAIU—the party in a position to benefit from the misrepresentation—ultimately lost the election is at least a relevant factor in assessing the overall impact of the misrepresentation. Contrary to petitioner's contention (Pet. 23-24, 31-36), moreover, the court did not indicate that GAIU's eventual loss was a dispositive factor. The court referred to it only in distinguishing a prior Sixth Circuit decision[5] where a contrary outcome had made it "more difficult for the * * * court to conclude that the Board had not abused its discretion when it concluded that the misrepresentation did not affect the election result" (Pet. App. 9a).[6]

While petitioner is correct (Pet. 21-22, 31-36) that elections have been set aside because of misrepresentations about wage comparisons, there is no inflexible rule in this respect. The materiality of the asserted misrepresentation must be considered in the context of all the circumstances of the particular election. Where, as here, "the thrust of [the]

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[5] *Diamond Electronics Division of Arvin Systems, Inc.* v. *NLRB*, 570 F. 2d 156 (6th Cir. 1978).

[6] Thus, contrary to petitioner's assertion (Pet. 31-36), the court of appeals did not attach significance to the Pressmen's victory in the run-off election on the theory that the Pressmen had "clean hands" and that it therefore would be unfair to set aside the election despite material and substantial misrepresentations by GAIU. The court referred to the Pressmen's victory only as an indication that GAIU's misrepresentation did not have a significant impact on the election and, therefore, that the misrepresentation was not material or substantial in the first place.

union's message" is true, the election will not be set aside.[7] *Follett Corp.* v. *NLRB*, 397 F. 2d 91, 95 (7th Cir. 1968). See also *Ex-Cell-O Corp.* v. *NLRB*, 449 F. 2d 1058, 1061 (D.C. Cir. 1971); *Jeffrey Manufacturing Co.*, 180 N.L.R.B. 701, 703 (1970); *National Waterlift Co.*, 175 N.L.R.B. 849, 850 (1969).[8] Therefore, the only issue actually presented is whether the Board, upheld by the court of appeals, reasonably applied the *Hollywood Ceramics* criteria to the facts of this case. That fact-bound issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951).

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[7]Here, the thrust of GAIU's message—that there were substantial wage disparities between petitioner's Dayton and York and Fayetteville plants—was true: the *average* differential was $.56 per hour for York and $.79 for Fayetteville (Pet. 5), with differentials in the wage rates for certain jobs comprising these averages ranging much higher. It is significant as well that GAIU's wage comparison was between petitioner's Dayton plant, where GAIU represented the employees, and petitioner's other plants, where the employees also were represented by a union, the rival Pressmen; the comparison was not between union and nonunion plants. Thus, to the extent that there was an overstatement of the wage differential, its impact reasonably could be expected to have been felt, if at all, in the distribution of votes between GAIU and the Pressmen, and it was unlikely to have had a material or substantial impact on employees who were considering a vote for no union at all.

[8]The cases cited by petitioner are distinguishable. Most involved qualitative distortions of the true wage picture, rather than mere exaggerations of a basically true message. See *NLRB* v. *Millard Metal Service Center, Inc.*, 472 F. 2d 647, 649 & n.7 (1st Cir. 1973) (comparison between skilled and unskilled wages; employer's wages actually competitive with unskilled wages paid by other company); *J.I. Case Co.* v. *NLRB*, 555 F. 2d 202, 205-206 (8th Cir. 1977) (pervasive misrepresentation of a number of items; maximum earnings of other employees portrayed as minimum earnings); *Gallenkamp Stores Co.* v. *NLRB*, 402 F. 2d 525, 532 n.6, 534 (9th Cir. 1968) (understating employees' current wages and comparing the understated wages to union wages paid only after one-year's employment created false impression that union contract provided higher wages than employees were currently receiving); *Graphic Arts Finishing Co.* v. *NLRB*, 380 F. 2d 893 (4th Cir. 1967) (union failed to advise employees that quoted "Union" wage rates were paid only in other cities, union understated by

2. Petitioner contends (Pet. 14-18) that the Board improperly considered GAIU's subjective intent in writing the handbill when the Board concluded that the reference to the pending back pay claims did not constitute a threat to abandon the claims if GAIU lost the election. This contention misapprehends the basis of the Board's decision. The Board did not hold, as petitioner would have it (Pet. 14), that the statement, when viewed from the perspective of the employees reading it, was a "threat," but that this supposed "threat" could be excused and the election results sustained because GAIU did not *intend* the handbill to be threatening. Rather, the Board held that the statement, objectively viewed, was not a threat at all because it did not "indicate * * * [GAIU's] intention to abandon its efforts to collect the disputed wages" (Pet. App. 23a).[9]

Accordingly, the only issue presented is whether the Board abused its discretion in concluding that the statement should be viewed not as an unprovoked threat directed to the employees, but as a response to the charges in petitioner's own letter written shortly before—a response in which GAIU "was merely describing what [*petitioner*] would *wish* to have happen should [GAIU] actually lose the election" (Pet. App. 23a; emphasis added). Petitioner has offered nothing (other than its erroneous contention that the Board relied on petitioner's subjective intent) to suggest that the

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$600,000 lost wages of union's members at another plant due to strike, *NLRB* v. *Van Gorp Corp.*, 615 F. 2d 759, 761 (8th Cir. 1980) (yearly cost of living raise rate under union's contract with employer at another plant misrepresented as a quarterly raise rate).

[9]Petitioner's argument to the contrary apparently hinges solely on the passage in the Board's opinion that "the intent of [GAIU's] response was to negate the unflattering implications left by [petitioner's] letter" (Pet. App. 23a). In context, however, this passage appears to be no more than the Board's conclusion regarding the *objective* intent of the GAIU's letter, from the perspective of the reader, not GAIU's subjective intent in sending it.

Board in this case improperly applied its accumulated expertise in assessing the probable impact on voters of statements made in heated union election campaigns. In any event, this particularized factual issue likewise raises no issue warranting further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1981

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